The Goldilocks Dilemma—Why Being "Too Hot" Isn't "Just Right": An Analysis of Sex Discrimination in Light of *Nelson v. Knight* and the "Irresistible" Employee

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INTRODUCTION

A young, twenty-year-old woman sat nervously in the dentist's office, anxiously awaiting her job interview. She was a fresh college graduate seeking a position as a dental assistant and hoped to work for this small, family-owned company. Her skills were unparalleled and her enthusiasm contagious. When she left the interview with a promise of employment, the woman couldn't believe her luck. She committed herself to the position and spent the next ten years working alongside the dentist—a man old enough to be her father.

While the woman's attitude, demeanor, and work performance surpassed those of prior assistants, the woman had one fatal flaw: she was beautiful. The dentist labeled the woman's clothing "revealing" and "distracting" and asked her not to dress in a manner that accentuated her body. The woman adamantly denied that her clothes were inappropriate and asked the dentist for clarification on the standard of dress. The response was simple—if the woman noticed the dentist's pants bulging, she should infer that her clothing was too tight and distracting.

But the woman never complained. She viewed the dentist as a father-figure and voluntarily engaged in texting conversations with him outside of the office. They talked about their children. They talked about work. And, to the woman's detriment, they once talked indirectly about sex.

When the dentist's wife discovered these messages, she became furious. The dentist's wife considered the woman a threat to her marriage. These concerns were only fueled when the dentist openly admitted that he would try to have an affair with the woman if he did not terminate her employment. In

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January, the woman was fired, though she had never done anything inappropriate and was the best employee the dentist ever hired. It did not matter that the woman possessed no interest in having an affair with the dentist. The dentist's potential inability to remain faithful to his wife was deemed a legitimate reason to terminate an otherwise remarkable employee.

This is the story of Melissa Nelson—now thirty-three years old—who currently works as a waitress to support her children.[1] In response to her firing in 2010, Ms. Nelson argued that she was a victim of gender discrimination and sought relief in the court system.[2] However, the recent ruling by the Iowa Supreme Court in *Nelson v. James H. Knight DDS, P.C.*, which upheld her employment termination, came as a shock to the public and media.[3] Some commentators labeled the case a "victory for family values,"[4] while others accused the court of perpetuating a rape-like culture within the workplace[5] where male supervisors cannot be held responsible for their urges and attractions.[6] After the court announced the outcome of the case, Paige Fiedler, Ms. Nelson's attorney, publicly addressed the implications of the decision: "[t]hese judges sent a message to Iowa women . . . that [they] are the ones who have to monitor and control their bosses' sexual desires."[7] The outrage over the case even resulted in a *New York Times* opinion columnist comparing the Iowa Supreme Court to a "Midwestern Taliban

1. Lena Sullivan, *PICTURED: The Assistant Melissa Nelson Fired by Dentist Because She Was "Irresistibly Attractive" and "Threat to His Marriage"*, GA DAILY NEWS (Dec. 22, 2012, 2:22 PM), http://www.gadailynews.com/news/national/147133-pictured-the-assistant-melissa-nelson-fired-by-dentist-because-she-was-irresistably-attractive-and-threat-to-his-marriage.html.

2. Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 67 (Iowa 2013).

3. The Iowa Supreme Court issued its first ruling in the case of *Nelson v. Knight* on December 21, 2012. Nelson v. James H. Knight DDS, P.C., No. 11-1857, 2012 WL 6652747 (Iowa Dec. 21, 2012). The court then recanted this opinion and issued a revised decision in July 2013. *Nelson*, 834 N.W.2d 64.

4. *Iowa Court Reconsiders Case Involving Dental Assistant Fired for Being "Irresistible"*, FOX NEWS (June 29, 2013), http://www.foxnews.com/us/2013/06/29/iowa-court-reconsiders-case-involving-dental-assistant-fired-for-being/.

5. Rape culture consists of blaming the victim, rather than the assailant or rapist, for the attack. Essentially, rape culture supports the notion that the victim provoked the assault and deserved the consequences. Sabrina Nelson, *Slut-Shaming and Rape Culture*, HUFFINGTON POST (May 15, 2013, 1:12 PM), http://www.huffingtonpost.com/sabrina-nelson/rape-culture_b_3279668.html.

6. *See, e.g.*, Jon D. Bible, Nelson v. Knight*: Can a Worker be Fired for Being Too Irresistible?*, BUS. L. TODAY, June 2013, at 1 ("The [*Nelson*] ruling has been criticized on a number of grounds. One is that it sends the message that men cannot be held accountable for their sexual desires and women have to monitor and control their bosses' urges."); Tom McKinney, *Sexual Harassment Law Case Study: Fired for Being "Too Attractive"*, CASTRONOVO & MCKINNEY (July 25, 2013), http://www.nyplaintiff.com/sexual-harassment-law-case-study-fired-for-being-too-attractive ("The lesson to be learned from th[e] [*Nelson*] case? That the definition of sexual discrimination and sexual harassment are debatable in court.").

7. Ryan J. Foley, *Bosses Can Fire Hot Workers For Being 'Irresistible': All-Male Court*, HUFFINGTON POST (Dec. 21, 2013, 4:17 PM), http://www.huffingtonpost.com/2012/12/21/bosses-irresistible-workers_n_2348381.html (internal quotation marks omitted).

tribunal."[8] Given the state of the economy and uncertain job market, the proposition to remain "asexual and unlovable" in the workplace has garnered attention since the ruling.[9]

Although the story of Melissa Nelson reignited outrage over men's "uncontrollable lust,"[10] the *Nelson* case offers deeper insight into the legal and societal framework of gender discrimination. While the literature discussing these established limitations is vast, the application of these principles to the publicly emerging fields of appearance-based discrimination and "lookism"[11] is rapidly developing. This Note contributes to existing scholarship in three ways: First, this Note examines the legal foundation—or lack thereof—for a claim of reverse discrimination based on "lookism." Second, this Note contends that the moral and equitable underpinnings of state and federal anti-discrimination laws are sufficiently crippled by the legislature's failure to prohibit appearance-based and "sex-plus" discrimination. Lastly, this Note argues that Ms. Nelson was a victim of what has recently been termed the "Goldilocks dilemma," in which an individual's appearance must be "just right" for the workforce.

To support these propositions, this Note is divided into five parts. Part I briefly discusses gender discrimination and sexual favoritism jurisprudence, focusing on congressional intent for each doctrine's creation. Part II analyzes recent developments in appearance-based discrimination and lookism, highlighting the alleged beauty bias present within society and the workforce. Part III examines the Iowa Supreme Court's decision in *Nelson*, emphasizing the court's reasoning and rationale for denying Ms. Nelson's gender discrimination claim. Part IV offers a critical analysis of the Iowa court's decision, explaining why the court's reasoning is fundamentally flawed. Following this analysis, Part IV transitions into an explanation of the Goldilocks dilemma, describing how both attractive and unattractive employees

8. Michael Kimmel, Op-Ed., *Fired for Being Beautiful*, N.Y. TIMES (July 16, 2013), http://www.nytimes.com/2013/07/17/opinion/fired-for-being-beautiful.html?_r=2&.

9. *See generally* Kat Stoeffel, *Go Ahead and Fire Your Distractingly Hot Assistant*, N.Y. MAG (July 12, 2013), http://nymag.com/thecut/2013/07/you-can-fire-your-distractingly-hot-assistant.html ("It's a tough job market out there, so stay asexual and unlovable, everyone.").

10. Pepper Schwartz, *Fired Because a Man Can't Control Himself*, CNN (July 16, 2013), http://www.cnn.com/2013/07/16/opinion/schwartz-fired-looks/.

11. The term "lookism," first used in 1978, refers to "prejudice or discrimination based on physical appearance and especially physical appearance believed to fall short of societal notions of beauty." *Lookism Definition*, MERRIAM-WEBSTER, http//www.merriam-webster.com/dictionary/lookism (last visited Aug. 20, 2013). "Lookism," therefore, signifies discrimination based on one's looks—typically discrimination towards the ugly. *See* Chris Warhurst et al., *Lookism: The New Frontier of Employment Discrimination?*, 51 J. INDUS. REL. 131, 132 (2009) (noting that "lookism" occurs when employers penalize employees for being "less physically attractive or having the 'wrong look'").

face discrimination based on their appearance. Specifically, this subsection examines the applicability of the Goldilocks dilemma to *Nelson*, and offers a further example of the Goldilocks dilemma in another context. The section then ends by advocating a sex-plus totality-of-the-circumstances test, which would remedy the inequality created in *Nelson* and redress the Goldilocks dilemma as a whole. Finally, Part V succinctly concludes the main principles of the Note.

I. Gender Discrimination and Sexual Favoritism Jurisprudence

A. An Introduction to Title VII

An understanding of both gender discrimination and sexual favoritism jurisprudence begins with Title VII of the Civil Rights Act of 1964. Viewed by some as landmark legislation, Title VII prohibits employment discrimination based on an individual's "race, color, religion, sex, or national origin."[12] Seeking initially to eliminate "barriers that have operated in the past to favor an identifiable group of white employees over other employees,"[13] Title VII now broadly remedies injuries suffered as a result of discriminatory employment practices based on gender, race, place of birth, and faith.[14] This power to "make whole" individuals who have historically suffered perverse discrimination in the United States is vested in the federal courts, which possess broad discretion in enforcing Title VII.[15] To assist the courts, Congress subsequently created the Equal Employment Opportunity Commission ("EEOC") to define and clarify Title VII.[16]

While Title VII has been the subject of substantial litigation since its passage in 1964, the United States Supreme Court limited the application of Title VII to two main forms of workplace discrimination: disparate treatment and disparate impact.[17] Disparate treatment occurs when an employee receives

12. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1) (2006).
13. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).
14. Civil Rights Act § 703.
15. Franks v. Bowman Transp. Co., 424 U.S. 747, 763–64 (1976). Sample remedies for unlawful discharge in violation of Title VII include reinstatement of the fired employee, payment of back wages, and other equitable relief. Civil Rights Act § 706.
16. Civil Rights Act § 705; Robert C. Bird, *More Than A Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137 (1997).
17. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) ("We long have distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination."); *see also* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 617 n.2 (1999) ("This court has recognized that two forms of discrimination are prohibited under Title VII: disparate treatment and disparate impact.").

discriminatory or different treatment based on a characteristic expressly protected by Title VII.[18] Alternatively, disparate impact is present when an employee challenges a facially neutral employment practice, asserting that the practice disproportionately harms a class of individuals protected under Title VII.[19] Under both the disparate impact and disparate treatment theories, a burden-shifting mechanism is employed by the courts.[20] To satisfy the burden of proof for a disparate treatment claim, the plaintiff must present a prima facie case of discrimination. This prima facie case includes demonstrating that the plaintiff: (1) belonged to a protected Title VII class; (2) applied for and was qualified for the employment position; (3) was denied employment; and (4) that the position remained open following the plaintiff's rejection.[21] If the plaintiff successfully presents her prima facie case, the burden of proof shifts to the employer to articulate a "legitimate, nondiscriminatory reason for the [plaintiff's] rejection."[22] If the employer can meet its burden of proof, the plaintiff must then prove that the justification offered by the employer is simply a pretext for a discriminatory motive.[23]

A nearly identical burden-shifting mechanism exists for cases of disparate impact; however, the prima facie case requires "a threshold showing of a significant statistical disparity."[24] Once this threshold has been met, the employer may offer a business necessity defense, arguing that the alleged discriminatory practice is required for successful business operation.[25] Finally, the burden shifts back to the plaintiff to demonstrate that the employer refused to consider or adopt less discriminatory employment practices.[26] Under this disparate impact model, the plaintiff need not prove discriminatory

18. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (explaining that with disparate treatment, "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin"); Jennifer Bercovici, *The Workplace Romance and Sexual Favoritism: Creating a Dialogue Between Social Science and the Law of Sexual Harassment*, 16 S. CAL. INTERDISC. L.J. 183, 187 (2006).

19. *Int'l Brotherhood of Teamsters*, 431 U.S. at 335 n.15.

20. The United States Supreme Court established the burden-shifting test in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

21. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 582 (1978).

22. *McDonnell Douglas*, 411 U.S. at 802.

23. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988).

24. Ricci v. DeStefano, 557 U.S. 557, 587 (2009).

25. *See* Am. Tobacco Co. v. Patterson, 456 U.S. 63, 89–90 (1982) (Stevens, J., dissenting) (noting that if the employment practice "is substantially related to a valid business purpose, the system is lawful"). *See generally* Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(k) (2006) (discussing the burden of proof in disparate impact cases).

26. Ritu Mahajan, *The Naked Truth: Appearance Discrimination, Employment, and the Law*, 14 ASIAN AM. L.J. 165, 180 (2007).

motive on the part of the employer.[27] Thus, Title VII exists to ensure that similarly situated employees are not treated differently based on their race, sex, religion, or national origin.

Although Title VII primarily protects minorities and individuals who have faced invidious discrimination throughout history, cases of reverse discrimination against groups considered traditionally favored remain possible under existing legislation.[28] In *McDonald v. Santa Fe Trail Transp. Co.*, Justice Marshall addressed reverse discrimination in the context of racial discrimination.[29] Writing for a unanimous Court, Justice Marshall declared that "[Title VII] prohibits [a]ll racial discrimination in employment, without exception for any group of particular employees . . . ."[30] Thus, the Supreme Court made clear that Title VII is not limited solely to discrimination against members of minority groups. Rather, Title VII applies equally to discrimination of all types.

When a reverse discrimination lawsuit is filed, the prima facie case under the burden-shifting framework must be adjusted. The presumptions afforded to protected groups under Title VII are not automatically justified when the plaintiff comes from a historically advantaged group.[31] However, the *McDonnell Douglas* burden shifting test "is not so inflexible" as to eliminate all reverse discrimination lawsuits.[32] Rather, the complainant bears the burden of proof to demonstrate that an employer intentionally discriminated against him regardless of his majority status.[33] The remaining elements under the *McDonnell Douglas* test "are modified to reflect the requirement that the plaintiff demonstrate he was

27. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

28. Reverse discrimination occurs when members of a majority or historically advantaged group (i.e., a group that has not faced widespread discrimination) claim that they have been treated unfavorably as a result of their characteristics. For instance, discrimination against a white male constitutes a case of reverse discrimination because African Americans and women are considered the historically disadvantaged groups that Title VII seeks to protect. *See, e.g.*, Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV., 1031 (2004) (discussing Title VII disparate treatment claims brought by whites and males).

29. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 273–79 (1976) (noting that the "terms [of Title VII] are not limited to discrimination against members of any particular race").

30. *Id*. at 283.

31. *See* Notari v. Denver Water Dep't, 971 F.2d 585, 589 (10th Cir. 1992); *see also* Mower v. Westfall, 177 F. Supp. 2d 940, 948 (S.D. Iowa 2001) ("[I]t only makes sense to handle reverse discrimination cases differently in order to adequately flush out whether any discrimination did in fact occur.").

32. Mills v. Health Care Serv. Corp., 171 F.3d 450, 454 (7th Cir. 1999).

33. Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985).

treated differently than other similarly situated employees who were not members of the protected group."[34]

Although Title VII may be read broadly to encompass reverse discrimination claims, Title VII is not a general fairness statute.[35] Employers may engage in unfair treatment of employees, so long as that treatment is not discriminatorily based on protected characteristics.[36]

B. Gender Discrimination and Sexual Harassment

The ban on gender discrimination in Title VII gives rise to viable claims of sexual harassment in the workplace.[37] While Title VII prohibited sex discrimination as early as 1964, sexual harassment was not recognized as an actionable form of sex discrimination until the 1980s.[38] This slow development of sexual harassment jurisprudence—a doctrine that is now well-established in American law—reflects a judicial misapplication of congressional debates in 1964.[39] Such misapplication is the result of scant legislative history surrounding the word "sex" in Title VII. The addition of the word "sex" to the statute occurred late in the legislative process and "deprived courts of a well-developed legislative history" to aid them in interpreting cases of sexual discrimination and sexual harassment.[40] Specifically, Howard W. Smith of Virginia offered an amendment on February 8, 1964—two days before the bill moved to the Senate—introducing the term "sex" into the act.[41] Congressman Smith was a "staunch opponent of all civil rights legislation" and only proposed the amendment as a last minute tactic to thwart passage of the

34. Murray v. Thistledown Racing Club, Inc., 603 F. Supp. 479, 483 (N.D. Ohio 1983); *see also* Lanphear v. Prokop, 703 F.2d 1311, 1315 (D.C. Cir. 1983) (recognizing that "some adjustment is necessary in the prima facie case required of a white male").

35. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (noting that Title VII is not "a general civility code").

36. Bible, *supra* note 6, at 1.

37. 29 C.F.R. § 1604.11(a) (1993). The EEOC defines the term "sexual harassment" to include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment." *Id.*

38. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e-1–17 (1994)); *see also* Mitchell Poole, *Paramours, Promotions, and Sexual Favoritism: Unfair, But is There Liability?*, 25 PEPP. L. REV. 819, 829 (1998).

39. Bird, *supra* note 16, at 143.

40. Veronica Diaz, Note, *Playing Favorites in the Workplace: Widespread Sexual Favoritism as Actionable Discrimination Under* Miller v. Department of Corrections, 16 S. CAL. REV. L. & SOC. JUST. 165, 182 (2006); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63–64 (1986) (discussing the lack of guidance concerning sex-based discrimination under Title VII).

41. 110 CONG. REC. 2,577 (1964); Bird, *supra* note 16, at 150.

entire Civil Rights Act.[42] In fact, "[c]onventional wisdom holds that Congress added a sex discrimination provision to Title VII as little more than a 'joke' or a political ploy."[43] Critics agree, concluding that almost no useful legislative history exists for interpreting the word "sex" in Title VII.[44]

Unfortunately, the lack of legislative guidance on the term "sex" has resulted in judicial misuse of the scant legislative records. Judges, afraid of expanding the scope of Title VII, have restricted coverage of Title VII's ban on sex discrimination by limiting the term "sex" to its traditional definition, thus precluding relief in discrimination cases involving sexual affiliations, sexual attractions, and sexual liaisons.[45]

Although Title VII's boundaries in sex discrimination cases are difficult to discern, the EEOC published guidelines on sexual harassment in 1980.[46] Serving as persuasive authority, these guidelines made clear that Title VII applies with full force to sexual harassment suits. Specifically, the EEOC recognized two types of sexual harassment claims: quid pro quo and hostile work environment.[47] Quid pro quo sexual harassment occurs when an employer or supervisor engages in adverse employment actions against an employee who refuses to submit to the supervisor's sexual advances.[48] Quid pro quo claims, therefore, involve "power imbalance[s] between supervisors and subordinates, [and also encompass notions] of sexual desire and sexual attraction."[49] When quid pro quo harassment is perpetrated by supervisors against subordinates, employers may thus be held strictly liable.[50]

In contrast to quid pro quo harassment, hostile work environment harassment occurs when sexual conduct unreasonably interferes with an employee's work performance and creates an intimidating or

42. Meghan E. Bass, *Dangerous Liaisons: Paramour No More*, 41 VAL. U. L. REV. 303, 307 (2006).
43. Bird, *supra* note 16, at 137.
44. *Id*. at 140.
45. DeCintio v. Westchester Cnty. Med. Ctr., 807 F.2d 304, 306–07 (2d Cir. 1986).
46. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (discussing the persuasive authority of the EEOC Guidelines); 29 C.F.R. § 1604.11 (1980).
47. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NO. 915.048, EEOC POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (Jan. 12, 1990), *available at* http://www.eeoc.gov/policy/docs/sexualfavor.html [hereinafter EEOC].
48. Tenge v. Phillips Modern Ag Co., 446 F.3d 903, 908 (8th Cir. 2006); Bercovici, *supra* note 18, at 188.
49. Glenn M. Gomes et al., *The Paramour's Advantage: Sexual Favoritism and Permissibly Unfair Discrimination*, 18 EMP. RESP. & RTS. J. 73, 76 (2006).
50. *Id*.

offensive work environment.[51] In determining whether a hostile work environment exists, the Supreme Court has applied both a subjective and an objective test. The subjective test requires the victim to be personally aware of the hostile environment.[52] The objective test requires the fact finder to determine whether the environment was hostile under a reasonable person standard.[53] Claims of hostile work environment harassment do not require tangible action by a supervisor. Rather, the harassment must be so pervasive that it gives rise to abusive working conditions.[54] The victim, however, need not suffer psychological or physical trauma from the hostile environment to present a viable claim of sexual harassment.[55]

When assessing claims of harassment, courts must determine the existence of harassing conduct in light of the entire record and must employ a totality-of-the-circumstances standard.[56] Courts should consider the nature of the sexual advances, the context in which the advances or harassment occurred, and the frequency of the harassing conduct.[57] For hostile work environment claims specifically, courts should additionally examine whether the conduct was physically threatening or humiliating, the severity of the conduct, and whether the conduct unreasonably limited or interfered with the employee's work performance and work product.[58] A single instance of sexual misconduct, while potentially sufficient to establish a quid pro quo claim when coupled with adverse employment action, will likely be insufficient to prove a hostile work environment claim.

C. Sexual Favoritism

While sexual harassment is prohibited by Title VII, claims of sexual favoritism are not afforded such protection. Sexual favoritism, also referred to as paramour favoritism, "occurs when an employee

51. Bercovici, *supra* note 18, at 188; *see* 29 C.F.R. § 1604.11 (2006) (describing conduct that qualifies as sexual harassment).
52. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993) (stating that "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment and there is no Title VII violation").
53. *Id*. at 21.
54. *Id*. at 22.
55. *Id*.
56. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 69 (1986); 29 C.F.R. § 1604.11(b) (1985).
57. Bercovici, *supra* note 18, at 188–89.
58. *Harris*, 510 U.S. at 22.

receives a benefit for being sexually involved with a superior employee or employer."[59] Such claims are typically brought by third parties outside of the sexual relationship and are often argued under the disparate-treatment prong of Title VII.[60] Unfortunately, for those adversely affected by sexual favoritism, such arguments are often unsuccessful.

Of the main cases addressing sexual favoritism, only one primary circuit court decision held that sexual favoritism was actionable. In 1985, the United States Court of Appeals for the D.C. Circuit decided *King v. Palmer*, in which a female nurse sued for sex discrimination when her supervisor promoted another nurse with whom he was romantically involved.[61] Although the district court ruled in favor of the supervisor and denied the sexual favoritism claim, the appellate court reversed.[62] As justification for the reversal, the D.C. Circuit reasoned that "unlawful sex discrimination occurs whenever sex is for no legitimate reason a substantial factor in the discrimination."[63] Given that the promotion was awarded to a nurse with whom the supervisor was sexually involved, the court determined that sex arguably played a substantial role in the discriminatory decision.[64] But for the favored nurse's sex, it is unlikely she would have received the promotion.

In contrast, the United States Court of Appeals for the Second Circuit rejected *King*'s interpretation of sexual favoritism in a 1986 decision. Establishing the current precedent for sexual favoritism cases, *DeCintio v. Westchester County Medical Center* construed the word "sex" in Title VII narrowly, holding that "sex" did not encompass "sexual activity."[65] To arrive at this conclusion, the court examined Title VII's reach within other protected categories:

> [T]he other categories afforded protection under Title VII refer to a person's status as a member of a particular race, color, religion or nationality. "Sex," when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual

59. Susan J. Best, Comment, *Sexual Favoritism: A Cause of Action Under A "Sex-Plus" Theory*, 30 N. ILL. U. L. REV. 211, 217 (2009).
60. Bercovici, *supra* note 18, at 187; Poole, *supra* note 38, at 826–27.
61. King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985), *abrogated on other grounds by* St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).
62. *Id*. at 878, 883.
63. *Id*. at 880 (internal quotation marks omitted).
64. *Id*.
65. DeCintio v. Westchester Cnty. Med. Ctr., 807 F.2d 304, 306 (2d Cir. 1986).

> activity regardless of gender . . . . The proscribed differentiation under Title VII, therefore, must be a distinction based on a person's sex, not on his or her sexual affiliations.[66]

Furthermore, the Second Circuit relied heavily on the EEOC's sexual harassment guidelines in refusing to find that Title VII reaches sexual favoritism suits. The EEOC guidelines specifically state that discrimination may occur when employment benefits are granted based on an individual's *submission* to a supervisor's sexual advances.[67] The word "submission" connotes a lack of employee consent, and thus a necessary element of the discrimination claim is coercion or harassment.[68] Therefore, claims premised on personal, social relationships do not fulfill the "submission" requirement and fall outside the scope of Title VII.[69]

In light of the *DeCintio* decision, the EEOC circulated a revised policy on sexual favoritism in 1990. This policy statement discussed three closely related forms of sexual favoritism, including isolated favoritism, coerced favoritism, and widespread favoritism.[70] Isolated instances of sexual favoritism were not found to violate Title VII, while the other two categories could support suits for sex discrimination.[71] In articulating this guideline, the EEOC explained that isolated instances of paramour favoritism are based upon consensual romantic relationships.[72] While such advantageous treatment is unfair, the EEOC refused to elevate this conduct to the level of discrimination. Rather, consensual relationships in the workplace are deemed inevitable and thus do not automatically result in a violation of Title VII when favorable treatment occurs.[73]

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66. *Id*. at 306–07.
67. *Id.*; *see* 29 C.F.R. § 1604.11(g) (1986).
68. *DeCintio*, 807 F.2d at 307–08.
69. *Id*. at 308; *see* Preamble to Interim Guidelines on Sex Discrimination, 45 Fed. Reg. 25024 (1980).
70. EEOC, *supra* note 47.
71. Bercovici, *supra* note 18, at 191. Widespread sexual favoritism claims can provide the basis for hostile work environment suits. *Id.* at 194–95.
72. *Id*.
73. Christina J. Fletcher, Comment, *Are You Simply Sleeping Your Way to the Top or Creating an Actionable Hostile Work Environment?: A Critique of* Miller v. Department of Corrections *in the Title VII Context*, 80 ST. JOHN'S L. REV. 1361, 1396 (2006); *see* Michael J. Levy, Note, *Sex, Promotions, and Title VII: Why Sexual Favoritism is Not Sexual Discrimination*, 45 HASTINGS L.J. 667, 673 (1994) ("The underlying relationship in a sexual favoritism case is one that is consensual in the sense that the participants want to be with each other and are involved in a relationship with no employment strings attached.").

In fact, courts and the EEOC view the alleged discrimination that takes place with sexual favoritism as "more akin to nepotism."[74] Sexual favoritism is deemed "a gender neutral, albeit unfair, justification for the given [discriminatory] action. If someone favors a 'close friend,' other men and women do not thereby have Title VII . . . claims."[75] Preferential treatment in the workplace disadvantages both males and females in the office who are not involved in the sexual relationship.[76] Because Congress meant solely to prohibit employer discrimination based on gender, sexual favoritism claims exceed the scope of Title VII.[77]

It is difficult for either a male or female employee to demonstrate that but for his or her gender, he or she would have received more beneficial treatment. The discrimination is not based on the sex of the employee, but rather on the gender of the paramour or supervisor.[78] Therefore, the victim is arguably not discriminated against based on his or her sex.

While courts and the EEOC have been relatively uniform in their interpretation of sexual favoritism cases, the refusal to equate isolated instances of favoritism with discrimination has garnered public criticism. According to some scholars, sexual favoritism cases represent the epitome of gender discrimination.[79] For instance, "the male supervisor who promotes his lover is discriminating on the basis of her gender, because he presumably would not have given her those job advantages if she were a man."[80] Furthermore, in response to the assertion that sexual favoritism discrimination arises from the paramour's gender, and not the sex of the victim, critics argue that a causal connection nonetheless exists between the supervisor's actions, his gender, the gender of the employee, and the victim of the alleged

74. Ayers v. Am. Tel. & Tel. Co., 826 F. Supp. 443, 445 (S.D. Fla. 1993); *see also* Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 905 (11th Cir. 1990).

75. *Ayers*, 826 F. Supp. at 445.

76. *See* Murray v. City of Winston-Salem, N.C., 203 F. Supp. 2d 493, 502 (M.D.N.C. 2002) (holding that the plaintiff's "allegations of sexual favoritism are insufficient to state a claim under Title VII"); *see also* EEOC, *supra* note 47 (noting that "not all types of sexual favoritism violate Title VII").

77. *See* Erickson, Sederstrom, P.C., *Suggestive Touching Irritates Spouse, Gets Employee Fired*, 11 NEB. EMP. L. LETTER 1, 2 (2006) (discussing cases in which courts have "not[ed] that Title VII prohibits discriminatory treatment based on someone's sex, not actions based on their sexual affiliations"); Levy, *supra* note 73, at 673.

78. James A. Burns, Jr., *Is Sexual Favoritism Sex Discrimination?*, 21 EMP. REL. L.J. 163, 165 (1995).

79. *See, e.g.*, Poole, *supra* note 38, at 832, 846.

80. Burns, *supra* note 78, at 165.

discrimination.[81] It is the victim's sex that places her either within or outside of the supervisor's gender preference.

Moreover, Congress amended Title VII in 1994 to create a "motivating factor" test for discerning whether sex discrimination occurred. Prior to 1989, the Supreme Court articulated and used the but-for causation test to determine whether an employee faced discrimination based on gender.[82] This but-for test required gender to be the central factor leading to an adverse employment outcome. Under the motivating factor test, however, an unlawful employment practice may be established where the employee claims that sex was simply an influential factor in the employment decision.[83] Other factors and concerns may also be present and drive the decision; sex, therefore, need only be *one* factor. Critics of the current sexual favoritism precedent believe the motivating factor test "clearly has the potential to fully legitimize a cause of action for sexual favoritism" if courts become willing to accept that gender plays a "key role" in favoritism.[84]

II. "Lookism" and Appearance-Based Discrimination

Analogous to the doctrines of gender discrimination and sexual favoritism are the presently evolving concepts of "lookism" and appearance-based discrimination. Closely intertwined, both lookism and appearance-based discrimination unfairly impact those who are seen as less physically attractive in the workforce.[85] Typically, these doctrines work "to advantage people perceived as attractive through preferential treatment, disadvantaging those perceived as unattractive through the denial of opportunities in tandem."[86] While lookism is sometimes seen as a proxy for sex or race discrimination, it is uniquely distinct in its applicability to classes both inside and outside the protected Title VII categories. Moreover, lookism and appearance-based discrimination are distinct from gender discrimination and sexual

81. Poole, *supra* note 38, at 832.

82. *Id.* at 844; *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) (interpreting Title VII "to mean that gender must be irrelevant to employment decisions"); City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (describing the "simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different") (citations omitted).

83. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(m) (2006).

84. Poole, *supra* note 38, at 844.

85. *See* Warhurst et al., *supra* note 11, at 132 (defining "lookism").

86. James Desir, Note, *Lookism: Pushing the Frontier of Equality by Looking Beyond the Law*, 2010 U. ILL. L. REV. 629, 632 (2010).

favoritism in that they are normative concepts subject to individualized sensitivities.[87] In other words, no clear standard exists by which to judge lookism and appearance-based discrimination. Rather, these doctrines capture amorphous forms of discrimination and implicate the alleged beauty bias.[88]

Importantly, lookism and appearance-based discrimination are two of the most pervasive forms of prejudice in the workplace, yet victims are repeatedly denied legal protection for their claims.[89] Because companies benefit immensely from hiring attractive employees to "cater to people's discriminatory preferences,"[90] those who are perceived as beautiful earn approximately ten percent more than their less attractive counterparts.[91] The subconscious association of beauty with additional positive traits—such as competence, honesty, hard work, and self-confidence—results in a strong hiring disadvantage to those who are overweight or do not conform to the conventional notions of beauty.[92] Such discrimination negatively affects job prospects and advancement opportunities for individuals who are not considered attractive.[93] Rather than focusing on a candidate's intellectual skill and accomplishments, employers make decisions according to their implicit biases.[94]

While lookism is inherently prejudicial and unfair, only seven jurisdictions in the United States prohibit some form of appearance-based discrimination. These locations include: (1) Santa Cruz, California; (2) San Francisco, California; (3) Michigan; (4) District of Columbia; (5) Madison,

87. *Id*. at 632, 646.

88. Mahajan, *supra* note 26, at 166–67.

89. William Safire, *Lookism: Uglies of the World, Unite!*, N.Y. TIMES MAG., Aug. 27, 2000, at 25.

90. DANIEL S. HAMERMESH, BEAUTY PAYS: WHY ATTRACTIVE PEOPLE ARE MORE SUCCESSFUL 102 (2011).

91. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 7 (2000); *see* CATHERINE HAKIM, EROTIC CAPITAL: THE POWER OF ATTRACTION IN THE BOARDROOM AND THE BEDROOM 167, 171 (2011) (recognizing that "[a]ttractive women earn between twelve percent and twenty percent more than unattractive women" and there is "a pure beauty premium of about ten percent").

92. Kimmel, *supra* note 8; *see also* HAKIM, *supra* note 91, at 169 (noting that "[m]ore attractive people have higher incomes, are more confident, and have better educational qualifications"); Mahajan, *supra* note 26, at 166–67 ("[P]sychologists found that more socially desirable traits, such as likeability, honesty, and competence, were attributed to the attractive individuals, whereas less attractive individuals were deemed lazy and unproductive.").

93. *See* Rachel E. Silverman, *Workplace Bullies Target the Unattractive*, WALL ST. J. (July 30, 2013), http://online.wsj.com/news/articles/SB10001424127887324809004578638380569624400; Victoria Woollaston, *Ugly People Are Less Likely to Succeed in the Workplace Because They Are Bullied by "Cruel and Harsh" Attractive Colleagues*, MAIL ONLINE (June 20, 2013), http://www.dailymail.co.uk/sciencetech/article-2344949/Ugly-employees-likely-bullied-cruel-harsh-attractive-colleagues.html.

94. Mila Gumin, *Ugly on the Inside: An Argument for a Narrow Interpretation of Employer Defenses to Appearance Discrimination*, 96 MINN. L. REV. 1769, 1773–74 (2012).

Wisconsin; (6) Urbana, Illinois; and (7) Howard County, Maryland.[95] A majority of these locations restrict employment discrimination on the basis of physical appearance; however, the definition of physical appearance varies significantly. The District of Columbia, for example, enacted the D.C. Human Rights Act ("DC-HRA") in 2001 "to secure an end . . . to discrimination for any reason other than that of individual merit."[96] The statute addresses appearance-based discrimination by making "personal appearance" an illegitimate basis for employment action.[97] "Personal appearance" is defined within the statute as including "the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming."[98] Similarly, Santa Cruz, California enacted legislation in 1992 that expanded the scope of Title VII to cover "sexual orientation, height, weight, or [other] physical characteristic[s]."[99] The term "physical characteristic" is further defined as "a bodily condition or bodily characteristic of any person which is from birth, accident, or disease, or from any natural physical development, or any other event outside the control of that person . . . ."[100] Thus, the Santa Cruz statute is more restrictive than the DC-HRA due to the fact that the physical trait must be immutable.

Although seven jurisdictions have paved the way for additional counties and states to enact appearance-based discrimination statutes, skepticism exists regarding whether any future action will be taken. The difficulty with outlawing appearance-based discrimination through legislation results from the near impossibility of creating a standardized definition of what appearance-based discrimination entails.[101] While one employer may perceive a 150-pound woman with brown hair, blue eyes, and an hourglass figure as less physically attractive than a 120-pound Indian woman, another employer may prefer an almost-anorexic blonde-haired woman. There is no universally accepted definition of beauty,

95. DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW 92 (2010); Jonathan Horn, *Can You Get Fired for Being Too Attractive?*, SAN DIEGO UNION TRIB. (Dec. 25, 2012), http://www.utsandiego.com/news/2012/Dec/25/can-you-get-fired-being-too-attractive/.

96. D.C. CODE § 2-1401.01 (2012); Desir, *supra* note 86, at 638–39.

97. D.C. CODE § 2-1401.01.

98. *Id.* § 2-1401.02.

99. SANTA CRUZ, CAL., MUN. CODE § 9.83.010 (2012).

100. *Id.* § 9.83.020(13).

101. *See* William R. Corbett, *Hotness Discrimination: Appearance Discrimination as a Mirror for Reflecting on the Body of Employment-Discrimination Law*, 60 CATH. U. L. REV. 615, 626 (2011) ("This initial task of defining covered appearance-related features is therefore one of the most significant hurdles in enacting such legislation . . . .").

and the standards for attractiveness vary significantly with time and culture. Unlike race and sex, which can be readily observed by all individuals, "[t]he linchpin for [appearance-based] coverage would be how the discriminators regarded the victim."[102] Merely listing the covered physical characteristics in the legislation would be under-inclusive and fail to account for different cultural perceptions of beauty.[103]

Furthermore, statutes that prohibit discrimination based solely on immutable characteristics face a difficult hurdle in adequately defining which attributes are unchangeable. For instance, obesity is often perceived as a physical trait within human control. However, some forms of obesity are predetermined by genetics or result from an incurable health condition.[104] In those circumstances, obesity cannot be reversed. But would such a condition be defined as an immutable physical characteristic? Would an individual have to undergo genetic testing to prove the immutability of the disease? These concerns fuel the growing body of scholarship advocating that lookism should not be federally or locally protected.

Beauty is thus an inherently subjective perception that differs for each individual. Statutes that prohibit lookism or appearance-based discrimination in effect force employers to turn a blind eye to the deeply ingrained importance of physical looks.[105] An employer should endeavor to interact with everyone in the work environment as though each person looked physically identical. The reality, however, is that appearance-based discrimination is prevalent in everyday life and represents a form of social engagement. All human beings constantly judge each other on the basis of outward appearance. The presence of anti-discrimination laws founded on lookism create "the potential for oppressive state intrusion" and can preclude an ordinarily innocent form of human interaction.[106] Finally, even in light of appearance-based

102. *Id*. at 628.

103. "For example, if a plaintiff sued for weight discrimination, an employer may be able to escape liability by claiming it discriminated based on general appearance rather than the particular covered trait." *Id.* at 626.

104. *Genetics of Obesity*, AM. MED. ASS'N, http://www.ama-assn.org/resources/doc/genetics/genetics-of-obesity.pdf (last visited Oct. 10, 2013).

105. Post, *supra* note 91, at 12; *see* Heather R. James, Note, *If You Are Attractive and You Know It, Please Apply: Appearance Based Discrimination and Employers' Discretion*, 42 VAL. U. L. REV. 629, 661 (2008) (noting that "the importance of beauty is so ingrained in American culture").

106. Post, *supra* note 91, at 8, 12.

legislation, lookism is extraordinarily difficult to prove without a direct admission from the employer, and victims are left without redress for their claims.[107]

III. The "Irresistible Employee": *Nelson v. Knight*

Unfortunately, the premise that gender assumes a central and undeniable role in sexual favoritism has not been widely adopted by courts in the United States. Most recently, this refusal to acknowledge gender discrimination in sexual favoritism claims is clearly illustrated in the case of *Nelson v. Knight*.[108] While this decision is limited in application as Ms. Nelson did not initiate a sexual harassment suit, the implication is clear: an employee who is terminated because she is the object of an employer's affection receives no protection under state or federal civil rights legislation.

A. The Facts

While the facts of the case are simple, they merit repeating. In 1999, Dr. James Knight hired twenty-year-old Melissa Nelson to work in his family-owned dental office as a dental assistant.[109] For over ten-and-a-half years, Ms. Nelson performed her duties with diligence and professionalism, and was "the best dental assistant [Dr. Knight] ever had."[110] On several occasions, however, Dr. Knight objected to Ms. Nelson's wardrobe, claiming that her clothing "was too tight and revealing and distracting."[111] Dr. Knight admitted that he periodically requested that Ms. Nelson put on her lab coat, later stating that he did this so that he would not observe Ms. Nelson wearing garments that accentuated her body.[112] In fact, it was beneficial that Ms. Nelson never wore tight pants because then Dr. Knight "would get it coming and

107. RHODE, *supra* note 95, at 133; *see* Gumin, *supra* note 94, at 1774 (describing that "very little protection or redress is available for victims [of appearance based discrimination] in today's legal world"). For example, between 2005 and 2007, the Department of Civil Rights in Michigan received only sixty-one complaints of appearance-based discrimination. RHODE, *supra* note 95, at 133. Of these complaints, none resulted in a final discrimination judgment. *Id.* Rather, "two-fifths (43 percent) were dismissed for insufficient evidence; about a quarter (26 percent) remained open; about a fifth (21 percent) settled; 6 percent were withdrawn to pursue action in court; and the remaining 3 percent were withdrawn or dismissed for lack of jurisdiction." *Id*.

108. Nelson v. James H. Knight DDS, P.C., 834 N.W. 2d 64, 67 (Iowa 2013).

109. *Id*. at 65.

110. *Id*. at 65–66.

111. *Id*. at 65 (internal quotation marks omitted).

112. *Id*. at 66.

going."[113] If Ms. Nelson ever observed Dr. Knight's pants bulging, she was told to infer that her clothing was inappropriate.[114]

During the final six months of Ms. Nelson's employment, Dr. Knight and Ms. Nelson began texting each other regarding work and personal matters.[115] The texts often discussed updates in their children's activities and "other relatively innocuous matters."[116] However, one text implied the infrequency of Ms. Nelson's sex life, to which Dr. Knight responded, "[t]hat's like having a Lamborghini in the garage and never driving it."[117] Dr. Knight then proceeded to ask how often Ms. Nelson experienced an orgasm.[118] Ms. Nelson did not respond.[119]

In late 2009, Jeanne Knight, Dr. Knight's wife, discovered these text messages.[120] Mrs. Knight insisted that her husband terminate Ms. Nelson's employment because Ms. Nelson represented a threat to the Knights' marriage.[121] After consulting with a church pastor, Dr. Knight agreed and fired Ms. Nelson on January 4, 2010.[122] As justification for the termination, Dr. Knight explained that "he was getting too personally attached to [Ms. Nelson]" and "feared he would try to have an affair with her."[123] Although Ms. Nelson only viewed Dr. Knight as a father figure, had no interest in a romantic relationship with him, and never received a work complaint, her employment was terminated at the request of Mrs. Knight.[124] Ms. Nelson's empty position was quickly filled by another female employee.[125] In response, Ms. Nelson filed a civil rights complaint alleging that Dr. Knight discriminated against her based on her sex.[126] Ms.

113. *Id*.
114. *Nelson*, 834 N.W.2d at 66.
115. *Id*. at 65. It is important to note that both parties initiated the texting and that neither party objected to the texting. *Id.* at 65–66.
116. *Id*. at 65.
117. *Id*. at 66.
118. *Id*.
119. *Id*.
120. *Nelson*, 834 N.W.2d at 66.
121. *Id*.
122. *Id*. Dr. Knight had arranged for another pastor from the church to be present during Ms. Nelson's termination. *Id.*
123. *Id*.
124. *Id*. at 65–66.
125. *Id*. at 66.
126. *Nelson,* 834 N.W.2d at 67.

Nelson did not, however, claim that she was the victim of sexual harassment.[127] The district court granted summary judgment in favor of Dr. Knight, and Ms. Nelson appealed.[128]

B. The Court's Reasoning

Unfortunately for Ms. Nelson, the Iowa Supreme Court, composed entirely of male justices,[129] rejected Ms. Nelson's allegations of gender discrimination in a 7–0 decision.[130] Although the first decision in the *Nelson* case was published in December 2012, the justices made a rare move in January by agreeing to reconsider the case without new evidence.[131] While the legal community interpreted the rehearing as an indication that one justice must have changed his mind,[132] the outcome of the case remained disappointingly the same.

Although Ms. Nelson advanced a straightforward "but-for" argument (i.e., she would not have been fired *but for* her gender), the court summarily dismissed her argument and instead focused principally on the alleged consensual relationship between Ms. Nelson and Dr. Knight.[133] According to the court, Ms. Nelson's employment termination was not the result of her gender, but rather the consequence of Dr. Knight's emotions and pressure to preserve family unity.[134] To support this holding, the court cited precedent from the United States Court of Appeals for the Eighth Circuit in *Tenge v. Phillips Modern Ag Co.*[135] In *Tenge*, the Eighth Circuit refused to find gender discrimination where the underlying facts were premised on a consensual romantic relationship between members of the opposite sex. Maelynn Tenge, a young secretary, worked for Scott Phillips for approximately ten years and became

127. *Id*.
128. *Id*. at 64, 67.
129. Bible, *supra* note 6, at 1.
130. *Nelson*, 834 N.W.2d at 73.
131. Jeff Eckhoff, *Court Maintains "Irresistible Employee" Lawfully Fired*, USA TODAY (July 12, 2013, 12:14 PM), http://www.usatoday.com/story/news/nation/2013/07/12
/iowa-court-again-rules-good-looking-employee-fired-lawfully/2512065/. Ms. Nelson filed her petition for rehearing on January 3, 2013. Jonathan Turley, *The Irresistible Woman Meets the Incorrigible Court: Iowa Supreme Court Issues New Opinion Upholding Firing in "Irresistible Attraction" Case*, JONATHAN TURLEY (July 15, 2013), http://jonathanturley.org/2013/07/15/the-irresistible-woman-meets-the-incorrigible-court-iowa-supreme-court-issues-new-opinion-upholding-firing-in-irresistible-attraction-case/.
132. Eckhoff, *supra* note 131.
133. *Nelson*, 834 N.W.2d at 70; *see also* Bible, *supra* note 6, at 1.
134. *See Nelson*, 834 N.W.2d at 70.
135. *Id*. at 67–69.

the highest paid employee in his company.[136] In 2002, however, Lori Phillips, Scott Phillips' wife, became jealous of Tenge and believed Mr. Phillips was having an affair.[137] Lori Phillips found love notes written from Tenge to Mr. Phillips, and Tenge subsequently admitted to pinching Mr. Phillips on the butt.[138] By January 2003, Mr. Phillips fired Tenge, stating that his wife made "[him] choose between [his] best employee or her and the kids."[139] Similar to Ms. Nelson, Tenge contested the employment termination on the ground of gender discrimination. In denying Tenge's claim, the Eighth Circuit held that Tenge was fired for her own consensual actions, not because she was female.[140] However, the court explicitly noted that this case did not address situations in which the jealous wife perceives an employee as a threat to the marriage without first being presented with evidence that the employee engaged in sexually suggestive conduct.[141]

The Iowa Supreme Court used the *Tenge* decision as a foundation for the holding in the *Nelson* case and agreed with the Eighth Circuit's reasoning that "if a specific instance of sexual *favoritism* does not constitute gender discrimination, treating an employee *unfavorably* because of such a relationship does not violate the law either."[142] The court determined that a sexual relationship existed between Ms. Nelson and Dr. Knight based primarily on Dr. Knight's inappropriate advances towards Ms. Nelson.[143] Because a consensual relationship alters the workplace dynamic, the consequences attaching to such a relationship cannot be perceived as gender motivated animus.[144] Thus, Ms. Nelson's termination was solely the result of Dr. Knight's individual feelings towards her, not the outcome of gender bias.[145]

To further bolster this conclusion, the court relied on the Eleventh Circuit's decision in *Platner v. Cash & Thomas Contractors, Inc.*[146] In *Platner*, a female employee was terminated for being perceived as a threat to a marriage within the company. The owner's son married a woman with a heightened sense of

136. Tenge v. Phillips Modern Ag. Co., 446 F.3d 903, 906 (8th Cir. 2006).
137. *Id*.
138. *Id*.
139. *Id*.
140. *Id*. at 910.
141. *Id*. at 910 n.5.
142. Nelson v. James H. Knight DDS, P.C., 834 N.W. 2d 64, 68 (Iowa 2013).
143. *Id*. at 78 (Cady, J., concurring)
144. *Id*. at 76, 79.
145. *See id*. at 76–77 (noting that conduct is based on sexual relationship rather than gender).
146. Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902 (11th Cir. 1990).

jealousy, and the wife believed that her husband was engaged in an affair with Platner.[147] The owner terminated Platner's employment "to protect his son" and to resolve a conflict within the family.[148] In upholding Platner's dismissal, the Eleventh Circuit determined that the ultimate basis for the dismissal "was not gender but simply favoritism for a close relative."[149]

Subtly, the Iowa Supreme Court capitalized on this notion of nepotism and implicitly suggested that Dr. Knight's conduct could be further explained as a form of favoritism for his wife.[150] Dr. Knight's motivation was not sex discrimination—in fact, Dr. Knight preferred to hire female employees[151]—but instead represented a commitment to family values and the restoration of his marriage. However, if Dr. Knight had a history of repeatedly taking adverse employment actions against female employees, a gender discrimination claim may have held weight.[152]

Thus, the court announced that the presence of an underlying relationship between Ms. Nelson and Dr. Knight—even though the relationship was arguably platonic—precluded a claim for gender discrimination.[153] While a woman does not lose the protection of anti-discrimination laws solely because of an employer's attraction towards her, a consensual relationship "produces responses and consequences that laws protecting an employee's right to work in an environment free from gender discrimination were not intended to protect."[154] Therefore, Ms. Nelson's employment termination was based on sexual activity, which is not protected under Title VII's ban on gender discrimination.[155]

Finally, although Ms. Nelson did not assert sexual harassment in her complaint, she argued that firing an employee to *avoid* committing sexual harassment in the future should be addressed under the

147. *Id*. at 903.
148. *Id*. at 905.
149. *Id.*
150. The Iowa Supreme Court never uses the term "nepotism" explicitly in its opinion. Rather, the court implies the existence of nepotism by repeatedly highlighting Dr. Knight's difficult choice in choosing between his wife and his favorite employee. *See* Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 68 (Iowa 2013) ("[T]he owner fired the plaintiff, stating that his wife was 'making me choose between my best employee or her and the kids.'").
151. *Id*. at 66 ("Historically, all of [Dr. Knight's] dental assistants have been women.").
152. *Id*. at 71.
153. *See id*. at 72.
154. *Id*. at 74 (Cady, J., concurring).
155. *Id*.

current Title VII framework.[156] The court rejected this argument, holding that an isolated decision to fire a female employee to prevent the creation of a hostile work environment was substantially different than cases in which the hostile environment actually arose.[157] The potential possibility of a hostile environment in the future was insufficient to establish a sexual harassment claim.[158] Thus, under the court's reasoning, an employer can assert "the devil is going to make me do it" as a legitimate rationale for firing an employee to avoid future claims of inappropriate sexual conduct.

IV. Analysis

A. Why the Iowa Supreme Court Got It Wrong

The Iowa Supreme Court's decision is misguided, misinformed, and results in substantial injustice to women. Although the court cited precedent and persuasive reasoning from *Tenge* and *Platner*, the underlying facts of Ms. Nelson's case preclude application of those standards. In *Tenge*, the fired employee admitted to flirting and pinching the butt of her employer, which the employer's wife reasonably believed to constitute sexual behavior.[159] Additionally, Tenge wrote a number of intimate notes to her employer, and the employer responded by grabbing Tenge's butt and hand in public.[160] In her deposition, Tenge even admitted that her physical conduct "was suggestive and of a risqué nature."[161] The interaction between Tenge and her employer was sexually charged, and the wife "could have suspected the two had an intimate relationship."[162]

In affirming Tenge's termination, the Eighth Circuit correctly concluded that Tenge was not fired because of her sex, but rather because of her sexual behavior with her married boss.[163] The court expressly limited its holding to factual scenarios involving an "employee's admitted consensual sexual conduct with an employer or supervisor."[164] The employee's own actions of pinching the employer's butt,

156. *Nelson*, 834 N.W.2d at 67, 72.
157. *Id*. at 72.
158. *Id*. at 72–73.
159. Tenge v. Phillips Modern Ag. Co., 446 F.3d 903, 906 (8th Cir. 2006).
160. *Id*.
161. *Id*.
162. *Id*.
163. *Id*. at 911.
164. *Id*. at 909.

writing five to ten sexual notes to the employer, and admitting that sexual chemistry existed between her and the employer constituted consensual sexual behavior.[165] Thus, Tenge's own affirmative actions led to her ultimate dismissal. The Eighth Circuit, however, was not faced with "a situation where an employee has engaged in no sexually suggestive behavior, but is terminated simply because an employer or supervisor's spouse perceives the employee to be a threat."[166]

Ms. Nelson's situation can be markedly contrasted to the facts in *Tenge* and falls outside the bounds of the Eighth Circuit's holding. Although the court asserts that Ms. Nelson was fired for her own sexual behavior, the court fails to disclose what Ms. Nelson's sexual conduct entailed. This was not a case like *Tenge* where the employee proactively engaged in flirtatious behavior. Rather, the factual allegations strongly suggest the purported romantic relationship was one-sided: (1) Dr. Knight stated that it wouldn't be good for him to see Ms. Nelson wearing clothing that accentuated her body; (2) Dr. Knight told Ms. Nelson that her clothing would be too tight if she saw his pants bulging; (3) Dr. Knight texted Ms. Nelson that her shirt was too revealing; (4) Dr. Knight told Ms. Nelson that if she wore tight pants he "would get it coming and going"; (5) Dr. Knight remarked that Ms. Nelson's allegedly infrequent sex life would be "like having a Lamborghini in the garage and never driving it"; and (6) Dr. Knight texted Ms. Nelson and asked "how often she experienced an orgasm," to which Ms. Nelson did not respond.[167] Although both parties initiated the texting, which was often related to their children's activities, Ms. Nelson denied ever engaging in flirtatious or intimate conduct with Dr. Knight.[168] However, several members of the court implied in their concurrence that because Ms. Nelson did not complain about the sexual content of their conversations, she actively engaged in creating a consensual sexual relationship.[169]

The court's premise of equating silence with consent is fundamentally flawed. There could be a myriad number of reasons for Ms. Nelson's silence, including her desire not to create conflict in the work environment. A direct confrontation with Dr. Knight could prove intimidating and uncomfortable and

165. *Tenge*, 446 F.3d at 906.
166. *Id*. at 907.
167. Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 65–66 (Iowa 2013).
168. *Id*. at 65.
169. *Id*. at 80.

could fundamentally alter their amicable workplace relationship. Another possible explanation for Ms. Nelson's decision to ignore the comments is the fact that Dr. Knight's wife worked in the same office.[170] An allegation of inappropriate sexual conduct would surely spread around the small office and reach the ears of Dr. Knight's wife. Such rumors and gossip could create tension within the workplace between Ms. Nelson, Dr. Knight, and Mrs. Knight, and lead to hostile work conditions or ostracism. Furthermore, because Ms. Nelson viewed her relationship with Dr. Knight as purely platonic, she could easily ignore text messages she felt were inappropriate without exacerbating the situation through confrontation.

The court, however, dismissed these potential explanations and characterized Ms. Nelson's refusal to complain as acceptance of a sexual relationship.[171] Ignoring the repeated advances Dr. Knight made towards Ms. Nelson, the court based its conclusion on the fact that Ms. Nelson voluntarily texted Dr. Knight, though the texts often centered on innocuous activities.[172] Rather than label the interaction as friendship, the court imputed sexual intentions to Ms. Nelson so that her behavior could fall within the scope of *Tenge*.[173] The court found a consensual, romantic, and sexually suggestive relationship between Ms. Nelson and Dr. Knight despite a complete lack of factual support for this conclusion.[174] By determining that Ms. Nelson contributed to the sexual environment, the court easily justified the termination on the basis of Ms. Nelson's own actions. What actions are these? The court never said.

In fact, because of the court's mischaracterization of the parties' relationship, the precedent in *Tenge* should never have been applied. Given that Ms. Nelson's conduct was platonic, it cannot reasonably be maintained that she was fired just for being a friendly co-worker. Such a determination could have a profoundly negative impact on work environments nationwide by sending the message that employees can be terminated for acting friendly towards an employer. This signal would deter all forms of personal interaction between the employer and employee outside the office.

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170. *Id*. at 66.
171. *Id*. at 67.
172. *Id*. at 66–67.
173. *Nelson*, 834 N.W.2d at 67–69.
174. *See, e.g.*, Richard Seymour, *Dental Nurse Sacked for Being Irresistible—All Perfectly Legal in Iowa*, THE GUARDIAN (Dec. 27, 2012), http://www.theguardian.com/commentisfree/2012/dec/27/dental-nurse-sacked-temptress-melissa-nelson ("Yet all the specific evidence [the court] describes shows that Nelson put up with, rather than instigated or encouraged, flirting.").

Because Ms. Nelson should not have been fired based on her own platonic actions, the only justification for the court's decision must rest on the wife's emotional jealousy. Jeanne Knight insisted on Ms. Nelson's employment termination because she represented a threat to the marriage.[175] Rather than chastise Dr. Knight for his inappropriate sexual behavior towards Ms. Nelson, Mrs. Knight punished an innocent party. Dr. Knight, in turn, acquiesced to his wife's demands to preserve his marriage.[176] However, the court's assertion that gender was not a substantial factor in this decision is naïve. According to Robert Steinbuch, "[t]he jealousy about which the defendant and his wife were concerned is very much linked to the sex of the plaintiff."[177] But for Ms. Nelson's gender, Dr. Knight would not have been attracted to her and Ms. Nelson would still be employed. Ms. Nelson's gender was arguably a primary factor in Dr. Knight's attraction to and pursuance of Ms. Nelson. It is therefore impossible to deny the obvious role of gender in Ms. Nelson's adverse employment action.

Furthermore, the court's reliance on sexual favoritism jurisprudence is misplaced. Sexual favoritism "exists when a *romantic* relationship between a superior and subordinate leads to decisions, actions or benefits that adversely affect the employment opportunities of other employees."[178] Ms. Nelson's case does not contain a consensual romantic relationship; rather, it is a situation involving a platonic friendship. If Ms. Nelson had displayed sexual or romantic behavior towards Dr. Knight, the doctrine of sexual favoritism could be used successfully to bar Ms. Nelson's action. This, however, was not the case presented to the court. It is irrational to apply sexual favoritism law when there is no underlying sexual relationship.

Finally, the last avenue of justification implied by the court (though never discussed in depth) is that Ms. Nelson's termination reflected Dr. Knight's preference for his wife. Thus, the court likened Ms.

175. *Nelson*, 834 N.W.2d at 66.

176. *See id.* (explaining that Dr. Knight was motivated by his emotions and commitment to his wife in acting upon the decision to terminate Ms. Nelson's employment).

177. Robert Steinbuch, *Don't Hate Me Because I'm Beautiful*, THE NAT'L L.J. (Mar. 4, 2013),http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202590548927&Dont_hate_me_because_Im_beautiful.

178. Gomes, *supra* note 49, at 77.

Nelson's situation to that of nepotism.[179] To support this comparison, the court relied on *Platner*, in which the Eleventh Circuit reasoned that the owner fired the plaintiff simply to protect his son. The court explained:

> It is evident that [the owner], faced with a seemingly insoluble conflict within his family, felt he had to make a choice as to which employee to keep . . . . However unseemly and regrettable nepotism may be as a basis for employment decisions in most contexts, it is clear that nepotism as such does not constitute discrimination under Title VII.[180]

In comparison, the Iowa Supreme Court suggested that Dr. Knight's decision to fire Ms. Nelson resulted from his desire to mend the relationship with his wife. Dr. Knight feared that if Ms. Nelson remained employed, he would attempt to engage in an affair with her.[181] Thus, to protect his marriage and prevent infidelity, Dr. Knight allegedly "favored" his wife over Ms. Nelson. The court's reliance on nepotism, however, is problematic.

First, it is questionable whether Dr. Knight's alleged favoritism towards his wife constituted nepotism. While nepotism is defined as favoritism based on kinship,[182] it has traditionally been limited to the hiring or promoting of a family member in the workplace.[183] While Dr. Knight did favor his wife over Ms. Nelson, he did not act to promote his wife or hire his wife over Ms. Nelson. Rather, Dr. Knight favored his wife on a solely personal level—i.e., he did not want to get divorced—not in an employment capacity. Thus, depending on whether a technical or functional definition of nepotism is used, the court's argument could be precluded.

Second, accepting nepotism in this context creates a slippery slope where the wife may challenge the employment of any female she sees as sexual competition. Although Ms. Nelson effectively raised this point,[184] the court summarily dismissed it by claiming that Title VII would provide protection if the

179. *Nelson*, 834 N.W.2d at 66; *see, e.g.*, Ayers v. Am. Tel. & Tel. Co., 826 F. Supp. 443, 445 (S.D. Fla. 1993) (establishing that employment decisions based on personal relationships are closer to nepotism than sexism: "The 'discrimination' is not based on sexism (whether gender or activity), but is rather more akin to nepotism.").

180. Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 905 (11th Cir. 1990).

181. *Nelson*, 834 N.W.2d at 66.

182. BLACK'S LAW DICTIONARY 1138 (9th ed. 2009) ("bestowal of official favors on one's relatives, esp. in hiring").

183. Ronald E. Riggio, *Is Nepotism a Good Thing, or Bad?*, PSYCHOL. TODAY (Oct. 31, 2012), *available at* http://www.psychologytoday.com/blog/cutting-edge-leadership/201210/is-nepotism-good-thing-or-bad.

184. *Nelson*, 834 N.W.2d at 70 ("[Nelson] suggests that without some kind of employee misconduct requirement, Dr. Knight's position becomes simply a way of enforcing stereotypes and permitting pretexts: The employer can justify a series of

adverse employment actions were taken repeatedly by the employer.[185] In other words, until Dr. Knight terminates the employment of multiple women at the request of his wife, gender cannot be claimed as a motivating factor.[186] Rather, the court required that multiple women suffer discrimination before any of one of them can recover.[187] By making this determination, the court essentially created an unprecedented "one free bite" rule for gender discrimination actions.[188] Thus, the decision of the Iowa court hinges on faulty logic and the application of factually distinguishable precedent.

B. The Goldilocks Dilemma

The unfortunate plight of Ms. Nelson highlights what has only recently begun to be called the Goldilocks dilemma.[189] Under this principle, an individual's "hotness" or beauty quotient factors principally into employment decisions. Implicating both lookism and appearance-based discrimination, the Goldilocks dilemma posits that an individual cannot be "too cold"—unattractive—or "too hot"—beautiful—within the workplace.[190] Unattractiveness results in a seven to nine percent wage penalty after hiring and significantly diminishes an individual's probability of obtaining employment in the first place.[191] Moreover, this form of appearance-based discrimination stigmatizes potential employees for factors partly beyond their control, undermines self-esteem, and negatively impacts job aspirations.[192] However, when an individual is too attractive, she risks not being taken seriously in the business world and can become the subject of sexually inappropriate remarks in the workplace.[193] As a form of reverse

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adverse employment actions against persons of one gender by claiming, 'My spouse was jealous.'").

185. *Id.* at 71.

186. *See id*. ("If an employer repeatedly took adverse employment actions against persons of a particular gender, that would make it easier to infer that gender and not a relationship was a motivating factor.").

187. *Id.*

188. The "one free bite" rule was historically established to prevent tort liability for the first time an owner's dog bit another individual. This principle requires "that the dog owner have knowledge of the dog's vicious nature before the owner might be held liable for its attack on someone who then brings suit." Al-Dabbagh v. Greenpeace, Inc., 873 F. Supp. 1105, 1111 n.8 (N.D. Ill. 1994).

189. Kimmel, *supra* note 8 ("But the professional beauty quotient has now morphed into what we might call the Goldilocks dilemma.").

190. *Id.*; *see generally* RHODE, *supra* note 95, at 97 ("[F]emale employees face stricter standards than male employees and can suffer discrimination for being either too attractive or not attractive enough.").

191. Kimmel, *supra* note 8; *see* HAKIM, *supra* note 91, at 168 ("Looks have an impact on chances of getting a job in the first place. There is a ten-percentage point difference in employment rates between unattractive an attractive men and women, as there is between short and tall people.").

192. RHODE, *supra* note 95, at 94–95.

193. *See* Matthew Heller, *I'm Too Sexy for My Boss, Lawsuits Claim*, 91 WORKFORCE MGMT. 20, 20 (2012) (quoting an employer who allegedly commented, "You are attractive, but should dye your hair brown to look smarter.").

lookism, "hotness discrimination" is "rooted in the same sexist principle as discrimination against the ugly. Both rest on the power of the male gaze."[194] Therefore, an individual must be "just right" with regards to appearance to avoid appearance-based discrimination and reverse lookism.

Ms. Nelson's case highlights the downfalls of being "too hot" in the workplace. In addition to Dr. Knight's motivation through gender to terminate Ms. Nelson, he was also strongly influenced by Ms. Nelson's beauty. When gender discrimination is combined with a typically neutral factor, the result is "sex-plus" or "gender-plus" discrimination.[195] Widely recognized by courts,[196] including the United States Supreme Court,[197] "sex-plus" refers to situations in which the employer does not discriminate against *all* individuals within a protected category, but rather only discriminates against a specific subset of individuals.[198] Thus, sex-plus discrimination occurs when gender and attractiveness are considered in tandem.

In Ms. Nelson's situation, the employment termination decision was significantly premised not only on her gender but also on her level of physical attractiveness. Dr. Knight accused Ms. Nelson of wearing low cut shirts and tight clothing that accentuated her body, causing him to become sexually aroused.[199] Had Ms. Nelson been less attractive, it is debatable whether Dr. Knight would have been romantically drawn to her. The record indicates that Dr. Knight habitually hired female employees;[200] thus, it was not solely Ms. Nelson's gender that resulted in her loss of employment. Rather, it was her sex *plus* her physical attractiveness that created the unfortunate situation. Ms. Nelson was treated significantly less favorably than a handsome male would have been treated at Dr. Knight's office.[201] Thus, not only

194. Daniela Ramirez, *This Woman was Fired for Being Too Attractive*, POLICYMIC (July 25, 2013), http://www.policymic.com/articles/56501/this-woman-was-fired-for-being-too-attractive (citation omitted).

195. Gee-Thomas v. Cingular Wireless, 324 F. Supp. 2d 875, 881 (M.D. Tenn. 2004).

196. *See, e.g.*, Chadwick v. WellPoint, Inc., 561 F.3d 38, 43 (1st Cir. 2009); Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 118 (2d Cir. 2004); Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 431–32 (6th Cir. 2004); Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1089 (5th Cir. 1975).

197. *See generally* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (discussing "sex-plus" precedent to determine whether differing hair length standards for men and women are discriminatory).

198. *Chadwick*, 561 F.3d at 43.

199. Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 65–66 (Iowa 2013).

200. *Id*. at 66.

201. *See* Steinbuch, *supra* note 177 (arguing that Dr. Knight would not have terminated Ms. Nelson had she "been a spectacularly striking man"); *see also* Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1251 (8th Cir. 1975) ("[S]imilarly situated individuals of one sex cannot be discriminated against vis-a-vis members of their own sex unless the same distinction is made

was Ms. Nelson a pure victim of the Goldilocks dilemma, but she also possessed a strong claim under the sex-plus theory of discrimination.

However, Ms. Nelson's situation is not the first case in which the Goldilocks dilemma has reared its unjust head. In 2009, the media devoted significant attention to the case of Debrahlee Lorenzana, an employee of Citibank who was allegedly fired for being too attractive.[202] According to Debrahlee's complaint, Citibank's Branch Manager and Assistant Branch Manager "began articulating inappropriate and sexist comments concerning [Debrahlee's] clothing and appearance."[203] Employees instructed Debrahlee not to wear particular items of clothing, including turtlenecks, pencil skirts, and tailored clothing because "such clothes were purportedly '*too distracting*' for her male colleagues and supervisors to bear."[204] These comments were directed solely at Debrahlee, regardless of the fact that tellers dressed in miniskirts and low-cut blouses.[205] Additionally, Debrahlee's hard-won client accounts were unfairly transferred to male employees.[206] As the inappropriate comments continued regarding Debrahlee's figure, Debrahlee called human resources up to three or four times per day.[207] Although her numerous complaints were initially unanswered, a human resource official finally visited the Citibank branch where Debrahlee worked.[208]

Unfortunately, Debrahlee's situation became markedly worse after the human resources visit. The comments regarding her figure and clothes were incessant.[209] While Debrahlee requested additional training sessions to improve her work product, these requests were denied, and Debrahlee was later informed that her work performance was poor.[210] Moreover, she was told that she had to wear high heels

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among those of the opposite sex.").

202. *See* Verified Complaint with Jury Demand at ¶ 7, Debrahlee Lorenzana v. Citigroup Inc., No. 09116382 (N.Y. Sup. Ct. Nov. 20, 2009), 2009 WL 4241578, at *3 ("Plaintiff was advised that . . . other compara[ble] females may wear what they like, as the[ir] general unattractiveness rendered moot their sartorial choices.").

203. *Id*. at ¶ 5.

204. *Id*. at ¶ 6.

205. Elizabeth Dwoskin, *Is This Woman Too Hot to Be a Banker?*, VILLAGE VOICE (June 1, 2010), http://www.villagevoice.com/2010-06-01/news/is-this-woman-too-hot-to-work-in-a-bank/2/.

206. *Id*.

207. *Id*.

208. *Id*.

209. *Id*.

210. *Id*. "An April 2009 quarterly report showed that [Debrahlee] was behind the other business bankers in monthly sales credits. On June 24, she received a letter saying that she was being put on final notice, that she was bringing in too little

to lift and move heavy files, whereas a male colleague was permitted to wear flip-flops.[211] Following this incident, Debrahlee complained to the vice presidents and followed up regularly to report additional incidents.[212] Finally, she was transferred to another Citibank branch; however, that branch had no need for a business banker.[213] Debrahlee was subsequently fired in August by a female branch manager.[214]

Debrahlee's comments following her employment termination demonstrate the harsh reality of the Goldilocks dilemma: "[i]f being less good-looking . . . means being happy . . . and not being sexually harassed and having a job where no one bothers you and no one questions you because of your looks, then, definitely, I'd want that. I think of that every day."[215] Women in the workplace walk a fine line between having their attractiveness contribute to their workplace success and becoming victims of harassment and discrimination.[216] Unfortunately, the majority of state and federal legislators have not seen fit to remedy the Goldilocks dilemma, with only one state and six counties or cities possessing some form of appearance-based discrimination statute.[217] Title VII is not a general civility code, and current logic assumes that prohibiting reverse lookism and appearance-based discrimination detracts significantly from Title VII's purpose.[218]

C. Sex-Plus Totality-of-the-Circumstances Test

It is exceedingly difficult to discern a bright-line rule when it comes to cases of gender and appearance-based discrimination, particularly when the Goldilocks dilemma is implicated. The Iowa Supreme Court's analysis held that employment termination based on emotions and alleged sexual conduct—both of which involved gender and appearance—was insufficient to surpass Title VII's

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business." *Id.*

211. *Dwoskin*, *supra* note 205.
212. *Id*.
213. *Id*.
214. *Id*.
215. *Id*. (internal quotation marks omitted).
216. Statement from Paige Fiedler, Attorney for Melissa Nelson (July 2013), *available at* http://localtvwhotv.files.wordpress.com/2013/07/statement-from-paige-fiedler-nelson-ruling.pdf.
217. Abby Dees, *Beauty Bias in the Workplace—Is Appearance Discrimination Ever Legal?* (Park Avenue Presentations), *available at* www.parkavenuepresentations.com/description_beauty_workplace.html (last visited March 2, 2014).
218. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998); Fletcher, *supra* note 73, at 1396.

threshold for discrimination.[219] This conclusion leaves women vulnerable to the Goldilocks dilemma without a vehicle for redress. Instead of solving the Goldilocks dilemma, the Iowa Supreme Court continued the trend of carving out exceptions to Title VII's coverage and undermined the efficiency and potency of anti-discrimination laws. To overcome the Goldilocks dilemma and offer sufficient protection for employees, courts should adopt a sex-plus totality-of-the-circumstances test as a replacement for the Supreme Court's motivating factor analysis.

The totality-of-the-circumstances ("TOTC") test "balances employee and employer rights with a legal scale that respects and honors the human person in all its diversity and beauty."[220] Specifically, the TOTC approach offers a "comprehensive, yet easily comprehensible framework with which to analyze Title VII [sex discrimination] cases."[221] Courts retain added flexibility to weigh the benefits and burdens of employer actions while simultaneously avoiding the rigidity of the motivating factor and but-for causation tests.[222] By combining the best elements of the mixed-motives, disparate impact, and disparate treatment tests into one, the TOTC analysis prohibits "nuanced manifestations based on traits and stereotypes."[223] Thus, the TOTC test offers a more inclusive and result-oriented examination of discrimination that reduces reliance on bias, immutability, and court-generated confusion.[224]

Although the TOTC test has been used primarily in determining whether a hostile work environment exists, expansion of the test to encompass sex-plus discrimination is warranted to promote equal opportunity. Under the TOTC approach, courts can more clearly determine if a particular trait is associated with an individual's identity and offer additional consideration to that person or group when the trait is targeted or compromised.[225] The role of immutability is substantially reduced, yet courts can

219. Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64 (Iowa 2013).
220. Mark R. Bandsuch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965, 1115 (2009).
221. *Id.* at 1110.
222. *Id.* at 1110–11.
223. *Id.* at 1115.
224. *See id*. at 1063 (explaining how the TOTC approach functions "to remedy primary problems related to bias, immutability, and confusion").
225. *Id*. at 1070.

still examine the same fundamental elements of discrimination discussed by the Supreme Court.[226] This broader framework helps fulfill the goals of the *McDonnell Douglas* test, which "was never intended to be rigid, mechanized, or ritualistic."[227]

Under the suggested TOTC analysis, four factors should be critically examined to help reduce discrimination. First, the court should determine whether an individual is in fact a member of a protected Title VII class. Second, the court should identify the "plus" factor and evaluate whether a non-protected group with this trait would likely have suffered discrimination. Third, the employer's motive or intentionality must be considered, and the degree to which the individual's protected class and "plus" characteristic contributed to this motive must be discerned. Finally, the court should look to the type and severity of harm suffered by the individual and potential social ramifications as a result of this discrimination.[228] By broadening the current analysis of sex-plus discrimination, courts continue to examine the principle elements of Title VII discrimination; however, this test removes the need for archaic rules and threshold limits for the various elements. Thus, the TOTC approach provides a greater degree of simplicity while simultaneously addressing the myriad forms of discrimination that have emerged in public consciousness.

Specifically, the TOTC test is the most beneficial means of eliminating (or at least substantially reducing) the prevalence of the Goldilocks dilemma. While the standard for a sex-plus claim has not been well defined,[229] it is understood that an individual must first make out a prima facie case of gender discrimination under the motivating factor test.[230] If an individual fails to meet the motivating factor threshold, the "plus" is irrelevant.

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226. Bandsuch, *supra* note 220, at 1063, 1065. These factors include "(1) less favorable treatment (material adversity); (2) to any of the statutorily protected groups; (3) perpetrated either intentionally, unintentionally, or with mixed-motives because of or based on a protected class." *Id*. at 1065–66.

227. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

228. *See generally* Bandsuch, *supra* note 220, at 1063 (listing comparable factors for a totality-of-the-circumstances analysis).

229. Cal. Civ. Prac. Emp. Litig. § 2:78 (2013).

230. *See* James, *supra* note 105, at 64 (describing how "the plaintiff must show that gender motivated the employer's actions").

Nowhere better is this pitfall seen than in the case of *Nelson v. Knight*. Particularly, the Iowa Supreme Court determined that Ms. Nelson's sex was not a motivating factor in her employment termination because of the alleged consensual romantic relationship between the parties and Dr. Knight's history of hiring female employees.[231] The court refused to acknowledge that if Ms. Nelson had been male, such adverse employment action would not have been necessary to remedy Mrs. Knight's jealousy. Moreover, the court wholly ignored the impact of Ms. Nelson's attractiveness on Dr. Knight's decision to pursue her. The harassing conduct experienced by Ms. Nelson was likely not the sole result of her gender—or else the previous and future female employees would be subject to the same level of harassing treatment—but rather occurred from a combination of Ms. Nelson's gender and beauty. While gender itself may not have been the primary or influencing factor in Dr. Knight's decision, gender combined with attractiveness certainly was. This case thus highlights the potential confusion courts face with whether sex must be the only factor, a primary factor, or merely *one* factor in the firing decision and fails to give due weight to "plus" considerations that unfairly disadvantage subsections of protected classifications.

It is only by transitioning outside of this rigid motivating factor framework that an equitable solution can be achieved. The TOTC test would not deny Ms. Nelson's claim simply because she was allegedly unable to establish a prima facie case of gender discrimination on its own. Rather, the TOTC analysis would evaluate Ms. Nelson's gender in conjunction with her attractiveness and discern whether these combined traits disproportionately influenced Dr. Knight's decision to terminate Ms. Nelson's employment. By examining these traits in tandem, the TOTC framework applies to the entire spectrum of discrimination and guards against nuanced forms of prejudice, such as the Goldilocks dilemma.

The case of *Nelson v. Knight* under the proposed TOTC test precisely illustrates the manner in which the Goldilocks dilemma can be overcome. First, the Iowa Supreme Court could have determined that Ms. Nelson was in fact a member of a protected Title VII class as a result of her female gender. While the presence and immutability of this trait factor heavily into the analysis, determining membership in a protected Title VII class is merely one element within the framework. Ms. Nelson need not prove that

231. Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64 (Iowa 2013).

gender alone was the influencing factor at this stage, and Ms. Nelson's claim would not have been won or lost on this basis alone. Second, the court could have identified attractiveness as the "plus" factor. This determination places Ms. Nelson within the subset of attractive females on the Title VII spectrum. With the sex-plus category defined, the court would then ask whether an attractive male under the exact same circumstances would have been subjected to the adverse employment action suffered by Ms. Nelson. The answer to this question is likely no. There are no facts or reasoning to suggest that a court would have imputed a consensual romantic relationship to same-sex parties on the basis of the texts and workplace conversations alone, as occurred in Ms. Nelson's situation.

Third, the Iowa Supreme Court could have articulated Dr. Knight's motive and considered to what extent Ms. Nelson's attractiveness as a female contributed to this motivation. As stated in the court's opinion, Dr. Knight fired Ms. Nelson because of his wife's suspicions that a romantic affair was occurring between the two parties and Dr. Knight's fear that he would attempt to harass Ms. Nelson in the future.[232] Mrs. Knight's jealousy was directly linked to Ms. Nelson's categorization as a beautiful female, and Dr. Knight's physical attraction to Ms. Nelson was, in part, due to her beauty and gender. Thus, Dr. Knight's motivation to terminate Ms. Nelson's employment to "favor" his wife was largely dependent on Ms. Nelson's sex-plus characteristics. Mrs. Knight likely would not have displayed jealousy at texts between her husband and an attractive male employee.

Finally, the court would have weighed the severity and type of harm suffered by Ms. Nelson while examining the broader societal impact of this form of discrimination. The TOTC test "does not focus on the number of times an abusive name was used against a plaintiff or how many complaints were initiated by other females; instead, it focuses on the conduct which affected the plaintiff and its effect as it reverberated throughout the work environment."[233] While Ms. Nelson's personal harm was limited to the loss of her job, her suit nonetheless caused critics to question whether courts hold men responsible for

232. *Id*. at 66–67.
233. Lori A. Mazur, Harris v. Forklift Systems, Inc.*: Keeping the Status Quo*, 47 RUTGERS L. REV. 291, 331 (1995).

their harassing behavior when such conduct does not satisfy the threshold motivating factor test.[234] Specifically, Ms. Nelson's case demonstrated the negative effects of the Goldilocks dilemma, which has become increasingly prevalent in society. The harm of the Goldilocks dilemma extends beyond stereotyping and job loss and affects female employees' self-confidence, respect, and enjoyment of the work environment. These non-traditional forms of prejudice are left unresolved under the current paradigm for sex discrimination claims and can only be remedied with a broader, more flexible framework. By analyzing both gender and attractiveness, the TOTC test identifies the core of the Goldilocks dilemma and actively seeks to expel this form of discrimination from society. The motivating factor and but-for causation tests, standing alone, are insufficient tests for discrimination and are, at best, ambiguous and overly simplistic. Neither test directly considers the weighty impact a "plus" factor can have on a traditionally protected category. Thus, a TOTC test that is intent and result oriented is necessary to adapt to modern forms of prejudice.

CONCLUSION

The unfortunate plight of Melissa Nelson cannot be denied. By refusing to hold Dr. Knight accountable for his impulses and sexual advances, the Iowa Supreme Court enforced an implicit assumption that women are responsible for keeping their sexuality under control in the workplace.[235] According to the media:

> The position embraced by the court will become a way to avoid liability for discrimination by relying on the stereotype that heterosexual men are unable to stop themselves from behaving inappropriately around attractive female co-workers . . . . Nowhere is Knight, the admitted aggressor in this case, held to any standard of accountability here—not by his wife, his pastor, or the law. Every institution reinforced that idea that it was Nelson to blame and that the solution to Knight's "problem" was to fire her.[236]

234. *See, e.g.*, Bible, *supra* note 6, at 1; Christopher Barkas & Elizabeth Burgess, *Sexy Discrimination? Fired for Being Too Attractive: Does the Law Provide Any Protection?*, US LAW (2013), http://web.uslaw.org/wp-content/uploads/2013/07/Christopher-Barkas-and-Elizabeth-Burgess-uslaw-mag-article.pdf.

235. *See* Bible, *supra* note 6, at 1.

236. Jessica Mason Pieklo, *Fired for Being Hot? How the Iowa Supreme Court Replaced Employment Law with Purity Culture*, RH REALITY CHECK (July 16, 2013, 4:57 PM), http://rhrealitycheck.org/article/2013/07/16/fired-for-being-hot-how-the-iowa-supreme-court-replaced-employment-law-with-purity-culture.

Thus, commentators have described the Iowa court's decision as a step backward for gender equality. Essentially, safeguarding against eroticism is just another burden women have to bear.[237]

In reconsidering the *Nelson* case, the Iowa Supreme Court erred in its fundamental assumption that Ms. Nelson was a consensual player in the alleged romantic relationship. Ms. Nelson's interactions with Dr. Knight resembled nothing more than friendship after ten years of working together. Yet, the court found a consensual, personal relationship where none existed, thus likening the *Nelson* case to Eighth Circuit precedent in *Tenge*. Through this erroneous comparison, the Iowa court determined that Ms. Nelson had been fired based on her own consensual sexual activity and not because of her gender.

The problem remains, however, that Ms. Nelson's gender was a significant factor in the employment termination decision. Dr. Knight's wife would not have exhibited jealousy toward a handsome male employee. Therefore, Ms. Nelson's beauty combined with her gender resulted in unfair and illegal discrimination. Such adverse treatment implicates the doctrine of "sex-plus" discrimination and illustrates the interplay between gender and the Goldilocks dilemma. The Goldilocks dilemma receives no attention or redress under the current motivating factor framework, and thus results in inequitable outcomes for Goldilocks victims. As a result, the flexible TOTC approach should be adopted to the increasingly nuanced and modern forms of discrimination. It is only through the TOTC test that the "plus" factor in sex-plus discrimination can be adequately addressed. Until such a test is enforced, a woman must possess an attractiveness level that is "just right" to survive in the workforce. The question, however, remains: in whose eyes is the attractiveness level judged? All too often for women, it is men who are the beholders of beauty and continue perpetuating the problematic Goldilocks dilemma.

237. Seymour, *supra* note 174.